

1 Thomas P. Mazzucco (tmazzucco@mpbf.com) – CA Bar No. 139758
2 Aaron K. McClellan (amcclellan@mpbf.com) – CA Bar No. 197185
3 Bryan L. P. Saalfeld (bsaalfeld@mpbf.com) – CA Bar No. 243331
4 Nicholas C. Larson (nlarson@mpbf.com) – CA Bar No. 275870
5 MURPHY, PEARSON, BRADLEY & FEENEY, P.C.
88 Kearny Street, 10th Floor
San Francisco, CA 94108-5530
Tel: (415) 788-1900
Fax: (415) 393-8087

6 Geoffrey Potter (gpotter@pbwt.com) (*pro hac vice*)
7 Michelle W. Cohen (mcohen@pbwt.com) (*pro hac vice*)
8 Christos G. Yatrakis (cyatrakis@pbwt.com) (*pro hac vice*)
9 Aron Fischer (afischer@pbwt.com) (*pro hac vice*)
10 PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
Telephone: (212) 336-2000
Fax: (212) 336-2222

11 Attorneys for Plaintiffs
12 INNOVATION VENTURES, LLC, LIVING ESSENTIALS, LLC,
13 and INTERNATIONAL IP HOLDINGS, LLC

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 INNOVATION VENTURES, LLC,
17 LIVING ESSENTIALS, LLC, and
18 INTERNATIONAL IP HOLDINGS,
19 LLC,

Plaintiffs,

- against -

20 PITTSBURG WHOLESALE GROCER,
21 INC. d/b/a PITCO FOODS, ET AL.,
22 Defendants.

23 **RELATED CROSS-ACTIONS.**

Case No. 12-5523 (WHA)

**~~PROPOSED~~ CONSENT
JUDGMENT AND PERMANENT
INJUNCTION**

24
25 On consent of Plaintiffs Innovation Ventures, LLC, Living Essentials, LLC, and International IP
26 Holdings, LLC (together, “Living Essentials”) and Defendant United Custom Distribution, LLC
27
28

**~~PROPOSED~~ CONSENT JUDGMENT and
PERMANENT INJUNCTION**


CASE NO. C-12-5523-WHA


(erroneously sued as United Custom Distributors, LLC) (“UCD”), it is hereby ORDERED, ADJUDGED and DECREED:


1. For purposes of this injunction, the “5-hour ENERGY® Marks” are:

- “5 HOUR ENERGY” (Registration No. 3,003,077);
- “5-HOUR ENERGY” (Registration No. 4,004,225);

-  (Registration No. 4,104,670);

-  which includes the wording “5-hour ENERGY” in black outlined in yellow, below which are the words “EXTRA STRENGTH” in yellow, along with a person in black silhouette, outlined in yellow, shown in an athletic pose adjacent to an uneven landscape, with the sky depicted in transitioning colors from black to red as the sky meets the landscape (Registration No. 4,116,951);

- , commonly referred to as “Running Man,” (Registration No. 3,698,044);
- and

-  which includes the wording “5-hour ENERGY” in black outlined in yellow, along with a person in black silhouette, outlined in yellow, shown in an athletic pose adjacent to an uneven landscape, with the sky depicted in transitioning colors from red to yellow as the sky meets the landscape (Registration No. 4,120,360).

2. For purposes of this injunction, the “5-hour ENERGY® Trade Dress” is the distinctive packaging used to distinguish 5-hour ENERGY® products in the marketplace and which consumers associate strongly with the products. The packaging is shown as follows:



3. For purposes of this injunction, the “5-hour ENERGY® Copyright” is United States Copyright Registration Number TX 6-833-514 for the “Caution” label used on the 5-hour ENERGY® bottle. The copyrighted work reads as follows:

CAUTION: Contains about as much caffeine as a cup of coffee. Limit caffeine products to avoid nervousness, sleeplessness, and occasionally rapid heartbeat. You may experience a Niacin Flush (hot feeling, skin redness) that lasts a few minutes. This is caused by Niacin (Vitamin B3) increasing blood flow near the skin.

4. UCD and its agents, servants, employees, and all other persons in active concert and participation with them, are permanently enjoined from:

- a. using any of the 5-hour ENERGY® Marks (or any marks confusingly similar thereto) on any counterfeit product in connection with the manufacture, sale, offer for sale, distribution, advertisement, or any other use of dietary supplements;
- b. using any logo, trade name, or trademark confusingly similar to any of the 5-

1 hour ENERGY® Marks which may be calculated to falsely represent or which
2 has the effect of falsely representing that the services or products of UCD or of
3 others are sponsored by, authorized by, or in any way associated with Living
4 Essentials;

- 5 c. infringing any of the 5-hour ENERGY® Marks, the 5-hour ENERGY® Trade
6 Dress, or the 5-hour ENERGY® Copyright;
- 7 d. falsely representing itself as being connected with Living Essentials or
8 sponsored by or associated with Living Essentials, or engaging in any act
9 which is likely to cause the trade, retailers, or members of the purchasing
10 public to believe that it or the other defendants are associated with Living
11 Essentials, provided, however, that the purchase and sale of 5-hour
12 ENERGY® products shall not in and of itself fall within this sub-paragraph;
- 13 e. using any reproduction, counterfeit, copy, or colorable imitation of any of the
14 5-hour ENERGY® Marks in connection with the publicity, promotion, sale, or
15 advertising of dietary supplements;
- 16 f. affixing, applying, annexing, or using in connection with the sale of any goods,
17 a false description or representation, including words or other symbols tending
18 to falsely describe or represent those goods as being 5-hour ENERGY® and
19 from offering such goods in commerce;
- 20 g. buying, selling, transferring (other than to Living Essentials or law
21 enforcement officials), altering, or destroying any counterfeit products with the
22 5-hour ENERGY® Marks; and
- 23 h. assisting, aiding, or abetting any other person or entity in engaging in or
24 performing any of the activities referred to in subparagraphs (a) through (g)
25 above.
- 26
27
28

1 5. Nothing contained in this Judgment and Permanent Injunction is or shall be
2 construed as an admission, express or implied, of any improper or illegal conduct, or of any
3 culpability or liability by UCD.

4 6. Any claims that UCD may have against any other individual or entity arising out
5 of UCD's purchase, distribution, advertising, offering for sale, and sale in commerce of the
6 products containing the 5-hour ENERGY® Marks are hereby assigned to Living Essentials.

7 7. In addition to other remedies, including damages, for contempt of this Permanent
8 Injunction, in the event of breach or violation of the terms of this Permanent Injunction by UCD,
9 its agents, servants, employees, affiliates, subsidiaries, or any other person in active concert and
10 participation with them, Living Essentials is entitled to a preliminary and permanent injunction
11 against the breaching conduct solely upon a showing of a likelihood of success of establishing
12 that such a breach occurred. A prevailing party, in addition to any award of damages or
13 injunctive relief, shall be entitled to an award of actual attorneys' fees in any such dispute. Living
14 Essentials and UCD each agree that jurisdiction and venue for such an action exist in this District
15 Court and UCD waives any and all defenses based on personal jurisdiction and venue.
16
17

18
19 This Judgment is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure, and this
20 action is hereby dismissed, with prejudice, only against UCD, without costs or attorneys' fees.
21
22
23
24
25
26
27
28

1 INNOVATION VENTURES, LLC,
2 LIVING ESSENTIALS, LLC, and
3 INTERNATIONAL IP HOLDINGS, LLC

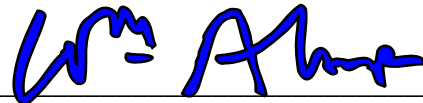
UNITED CUSTOM DISTRIBUTION,
LLC

4 By: /s/Christos Yatrakis
5 Geoffrey Potter, Esq.
6 Michelle W. Cohen, Esq.
7 Christos Yatrakis, Esq.
8 Patterson Belknap Webb & Tyler LLP
9 1133 Avenue of the Americas
10 New York, NY 10036
11 (212) 336-2000
12 *Attorneys for Innovation Ventures, LLC,*
13 *Living Essentials, LLC, and*
14 *International IP Holdings, LLC*

By: /s/ Dean Alper
Dean A. Alper, Esq.
Alper & McCulloch
100 Drakes Landing Road, Suite 160
Greenbrae, California 94904
Attorneys for United Custom
Distribution, LLC

15 **IT IS SO ORDERED.**

16 DATED: August 15, 2013.

17 

18 William Alsup
19 United States District Judge